PP v. KULANDAI SEPATHI RAJ

COURT OF APPEAL, PUTRAJAYA
ZAKARIA SAM JCA
AHMADI ASNAWI JCA
ZAMANI A RAHIM JCA
[CRIMINAL APPEAL NO: J-05(SH)-218-08-2015]
5 SEPTEMBER 2016

CRIMINAL LAW: *Dangerous Drugs Act 1952 – Section 39B(1)(a) – Trafficking – Reduction of charge from trafficking to lesser offence of possession – Whether flawed, unsupported and against weight of evidence – Defence of innocent carrier – Whether established – Whether prosecution proved case of passive possession – Whether there was active act of transporting, carrying and concealing of dangerous drugs – Whether prosecution proved case of direct trafficking against respondent beyond reasonable doubt – Whether trial judge fell into serious error when reducing charge – Whether custodial sentence imposed by trial judge set aside and substituted with mandatory death sentence*

CRIMINAL PROCEDURE: *Appeal – Appeal by prosecution – Reduction of charge from original charge of trafficking under s. 39B(1)(a) of Dangerous Drugs Act 1952 to lesser offence of possession under s. 12(2) – Whether flawed, unsupported and against weight of evidence – Defence of innocent carrier – Whether established – Whether prosecution proved case of passive possession – Whether there was active act of transporting, carrying and concealing of dangerous drugs – Whether prosecution proved case of direct trafficking against respondent beyond reasonable doubt – Whether trial judge fell into serious error in reducing charge – Whether custodial sentence imposed by trial judge set aside and substituted with mandatory death sentence*

The respondent, an Indian national, was charged for trafficking in ketamine, a dangerous drug under the Dangerous Drugs Act 1952 ('the Act'). The respondent was seen pulling a trolley bag at the arrival hall of Lapangan Terbang Antarabangsa Senai. Upon a routine check, a customs officer, PW3, scanned the said trolley bag and captured suspicious images on its screen. Upon inspection of the trolley bag and eight computer bags carried by the respondent, eight black cloth pouches containing whitish crystalline substance were found. The suspected drugs were then secured, sealed and handed over to the government chemist, PW2, who confirmed the drug exhibits contained a total of 1,810g of ketamine. The trial judge found that the respondent had actual possession or *mens rea* possession of the drug ketamine in the eight computer bags in the trolley bag. The respondent was then called to enter his defence as charged. The respondent submitted his occupation was supplying various types of bag in Chennai and Tamil Naidu. The respondent alleged that he had obtained the bags from the supplier named Hakimbai, who told him that he had a friend in Delhi who could supply him the bags which were of better quality. In Delhi, the respondent met Hakimbai's friend ('the Hindi man') who gave him a trolley bag ('P8').

A The Hindi man did not open the trolley bag to show the sample bags in it and their contents; neither did the respondent open the trolley bag. According to the respondent, he had no knowledge of the contents of the trolley bag and stated that he had come to Malaysia to sell his bags. The trial judge held that the respondent had succeeded in establishing the defence of
B innocent carrier, thus rebutting the evidence of trafficking. The respondent was then acquitted of the trafficking charge but convicted of the lesser offence of possession under s. 12(2), punishable under s. 12(3) of the Act. Upon mitigation, he was sentenced to five years imprisonment. Dissatisfied with the decision and the reduction of the charge, the Public Prosecutor appealed.
C The issue that arose for determination was whether the trial judge erred in amending the charge under s. 39B(1)(a) and punishable under s. 39B(2) of the Act at the conclusion of the defence case. It was argued that the prosecution had successfully proved the charge of trafficking against the respondent and that the decision of the trial judge should therefore be set aside.

D **Held (allowing appeal)**
Per Zamani A Rahim JCA delivering the judgment of the court:

(1) The amendment and reduction of the charge by the trial judge was flawed with some erroneous statements by His Lordship relating to our drugs law. The trial judge found that the respondent had given reliable
E evidence to establish his defence of innocent carrier, which meant that the respondent had given the explanation which was acceptable to the trial judge that the respondent had no knowledge of the drugs in the trolley bag and the eight computer bags. In the next moment, the trial judge had somewhat backpedalled or resiled from his earlier finding that
F the respondent's defence of innocent carrier was credible. His Lordship went on to find that the prosecution had proved a case of passive possession against the respondent. The finding of the trial judge had leapfrogged from no knowledge of the drug to having knowledge thus possession was said to be proven, though passive. (paras 30 & 31)

G **(2)** The finding of the trial judge that the evidence of trafficking was lacking to warrant such finding had flatly contradicted His Lordship's earlier finding at the close of the prosecution's case. At the *prima facie* stage, the trial judge found that there was an active act of transporting, carrying and concealing of dangerous drugs in the trolley bag and in the eight
H computer bags which came within the definition of trafficking in s. 2 of the Act. The direct trafficking in s. 2 of the Act involves an overt act on the part of the respondent to move the drugs either by land, sea or air for the purpose of trafficking to another person or persons and not just a mere keeping or holding. In other words, a mere possession, *albeit*
I passive possession of the drugs and nothing more, for example, keeping or holding the drugs *simpliciter*, was insufficient to constitute trafficking. Clearly, in the instant case the trial judge had misconstrued or mishandled the facts presented before him. On the respondent's part,

he had failed to give an explanation regarding the prosecution's case of direct trafficking which had been proved against the respondent beyond reasonable doubt. (paras 32 & 33)

(3) The respondent was caught carrying the trolley bag from Delhi to Johor Bahru. However, the trial judge still maintained the view that the prosecution had failed to prove a case of drug trafficking against the respondent beyond reasonable doubt. This was clearly contrary to the decision of this court in *Samad Mohamed Sulthan v. PP*. The trial judge had fallen into serious error in reducing the charge against the respondent from the original charge of trafficking under s. 39B(1)(a) and punishable under s. 39B(2) of the Act to a lesser offence of possession under s. 12(2) and punishable under s. 12(3) of the Act. Such reduction of the charge was unsupported and against the weight of evidence adduced. Thus, the custodial sentence of five years imposed by the trial judge was set aside and in its place, this court substituted with the mandatory sentence of death, an offence of drug trafficking under s. 39B(1)(a) and punishable under s. 39B(2) of the Act. (paras 33-35)

Bahasa Malaysia *Headnotes*

Responden, seorang warganegara India, dituduh dengan kesalahan mengedar ketamine, dadah berbahaya di bawah Akta Dadah Berbahaya 1952 ('Akta'). Responden dilihat menarik sebuah beg troli di balai ketibaan Lapangan Terbang Antarabangsa Senai. Satu pemeriksaan rutin dijalankan di mana seorang pegawai kastam, PW3, telah mengimbas beg troli tersebut dan mengesan beberapa imej mencurigakan pada skrinnya. Apabila pemeriksaan selanjutnya dibuat ke atas beg troli dan lapan beg komputer yang dibawa oleh responden, lapan kantung kain berwarna hitam mengandungi bahan kristal putih dijumpai. Bahan-bahan yang disyaki dadah itu kemudiannya disimpan, dikedap dan diserahkan kepada ahli kimia kerajaan, PW2, yang mengesahkan ekshibit-ekshibit dadah tersebut mengandungi 1,810g ketamine. Hakim bicara mendapati bahawa responden mempunyai milikan sebenar atau milikan *mens rea* dadah ketamin di dalam lapan beg komputer di dalam beg troli tersebut. Responden kemudiannya dipanggil membela diri atas kesalahan tersebut. Responden menghujahkan bahawa pekerjaannya adalah membekalkan beberapa jenis beg di Chennai dan Tamil Naidu. Responden mendakwa bahawa dia memperolehi beg-beg daripada pembekal bernama Hakimbai, yang memberitahunya bahawa dia mempunyai seorang kawan di Delhi yang boleh membekalkan beg yang mempunyai kualiti yang lebih tinggi. Di Delhi, responden menemui kawan Hakimbai ('lelaki Hindi') yang telah memberikan beg troli ('P8'). Lelaki Hindi itu tidak membuka beg troli tersebut untuk menunjukkan sampel-sampel beg dan kandungannya, dan responden juga tidak membuka beg troli tersebut. Menurut responden, dia tidak mempunyai pengetahuan berkenaan kandungan beg troli itu dan menyatakan bahawa dia telah berkunjung ke Malaysia untuk menjual beg-begnya. Hakim bicara memutuskan bahawa responden berjaya membuktikan

pembelaan pembawa tidak bersalah, oleh itu menyangkal keterangan pengedaran. Responden dengan itu dilepaskan daripada pertuduhan pengedaran tetapi disabitkan atas kesalahan yang lebih ringan iaitu kesalahan milikan di bawah s. 12(2), dihukum di bawah s. 12(3) Akta. Dengan mitigasi, responden dijatuhkan hukuman penjara lima tahun. Tidak berpuas hati dengan keputusan dan pengurangan pertuduhan, Pendakwa Raya merayu. Isu yang dibangkitkan untuk pertimbangan adalah sama ada hakim bicara terkhilaf apabila meminda pertuduhan daripada s. 39B(1)(a) dan dihukum di bawah s. 39B(2) Akta di akhir kes pembelaan. Dihujahkan bahawa pihak pendakwaan berjaya membuktikan kesalahan pengedaran terhadap responden dan keputusan hakim bicara sepatutnya diketepikan.

Diputuskan (membenarkan rayuan)
Oleh Zamani A Rahim HMR menyampaikan penghakiman mahkamah:

(1) Pindaan dan pengurangan pertuduhan oleh hakim bicara dicacatkan dengan kenyataan salah hakim bicara berhubung undang-undang dadah. Hakim bicara mendapati bahawa responden telah memberikan keterangan yang boleh dipercayai untuk membuktikan pembelaan pembawa tidak bersalah, yang bermaksud bahawa responden telah memberi penjelasan yang boleh diterima kepada hakim bicara bahawa responden tidak mempunyai pengetahuan berkenaan dadah-dadah dalam beg troli dan lapan beg komputer itu. Seterusnya, hakim bicara sedikit sebanyak terpesong daripada dapatan awalnya bahawa pembelaan pembawa tidak bersalah responden boleh dipercayai. Hakim bicara kemudiannya memutuskan bahawa pihak pendakwaan telah membuktikan kes milikan pasif terhadap responden. Dapatan hakim bicara beralih daripada tiada pengetahuan dadah ke mempunyai pengetahuan dan oleh itu milikan telah dibuktikan, walaupun pasif.

(2) Dapatan hakim bicara bahawa keterangan pengedaran tidak memadai untuk mewajarkan pendapatan sebegitu jelas bertentangan dengan dapatan hakim bicara sebelum ini semasa penutup kes pendakwaan. Pada peringkat *prima facie*, hakim bicara mendapati bahawa terdapat tindakan aktif mengangkut, membawa dan menyembunyikan dadah berbahaya di dalam beg troli dan dalam lapan beg komputer yang termasuk dalam definisi pengedaran dalam s. 2 Akta. Pengedaran langsung dalam s. 2 Akta melibatkan satu tindakan terang-terangan oleh responden untuk menggerakkan dadah melalui darat, laut atau udara bagi tujuan pengedaran ke pihak lain dan bukan hanya dengan menyimpan atau memegang. Dalam erti kata lain, milikan, meskipun milikan pasif dadah-dadah itu dan tidak lebih daripada itu, contohnya, menyimpan dan memegang dadah itu, tidak memadai untuk membentuk pengedaran. Jelas bahawa dalam kes ini, hakim bicara tersalah anggap atau telah mengendalikan fakta-fakta yang dikemukakan dengan salah.

Bagi responden pula, dia gagal memberi penjelasan berkenaan kes pendakwaan berhubung pengedaran langsung terhadap responden yang terbukti melampaui keraguan munasabah.

(3) Responden ditangkap membawa beg troli dari Delhi ke Johor Bahru. Walau bagaimanapun, hakim bicara masih mengekalkan pandangan bahawa pihak pendakwaan gagal membuktikan kes pengedaran dadah terhadap responden melampaui keraguan munasabah. Ini jelas bertentangan dengan keputusan mahkamah dalam kes *Samad Mohamed Sulthan v. PP*. Hakim bicara terkhilaf dalam mengurangkan pertuduhan terhadap responden daripada pertuduhan asli iaitu pengedaran di bawah s. 39B(1)(a) dan dihukum di bawah s. 39B(2) Akta ke kesalahan yang lebih ringan iaitu kesalahan milikan di bawah s. 12(2) dan dihukum di bawah s. 12(3) Akta. Pengurangan pertuduhan sebegitu tidak disokong dan bertentangan dengan keterangan yang dikemukakan. Oleh itu, hukuman penjara lima tahun yang dikenakan oleh hakim bicara diketepikan dan mahkamah menggantikannya dengan hukuman mati mandatori, satu kesalahan pengedaran dadah di bawah s. 39B(1)(a) dan dihukum di bawah s. 39B(2) Akta.

Case(s) referred to:
Hoh Bon Tong v. PP [2010] 5 CLJ 240 CA ***(refd)***
Ong Ah Chuan v. PP & Koh Chai Cheng v. PP [1980] 1 LNS 181 PC ***(refd)***
Samad Mohamed Sulthan v. PP [2012] 1 LNS 819 CA ***(refd)***

Legislation referred to:
Dangerous Drugs Act 1952, ss. 2, 12(2), (3), 39B(1)(a), (2), First Schedule
Poisons Act 1952, Third Schedule

For the appellant - Tg Amir Zaki Tg Abdul Rahman; DPP
For the respondent - T Vijayandran; M/s T Vijay & Co

[Editor's note: Appeal from High Court, Johor Bahru; Criminal Trial No: 45A-31-8-2013 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zamani A Rahim JCA:

Introduction

[1] The respondent, Kulandai Sepathi Raj, an Indian national, was charged for trafficking in ketamine, weighing 1,810g, a dangerous drug under the Dangerous Drugs Act 1952 (the Act). The charge against him reads:

> Bahawa kamu pada 20 Mac 2013 jam lebih kurang 4.00 petang di Balai Ketibaan Lapangan Terbang Antarabangsa Senai, di dalam Daerah Johor Bahru, dalam Negeri Johor Datul Takzim, telah didapati mengedar dadah berbahaya iaitu jenis ketamine seberat 1810 gram dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] At the close of the prosecution's case, a *prima facie* case was made out against the respondent. He was called upon to enter his defence.

[3] At the conclusion of the trial, he was acquitted of the trafficking charge but convicted of the lesser offence of possession under s. 12(2), punishable under s. 12(3) of the Act. The reduced charge was duly amended on 1 July 2015 and marked as exh. P24. Exhibit P24 was read and explained to the respondent and he understood the same (p. 77 of appeal record vol. 1). Upon mitigation, he was sentenced to five years imprisonment with effect from the date of arrest ie 20 March 2013.

[4] Dissatisfied with the decision and the reduction of the charge, hence this appeal by the Public Prosecutor. Having heard the arguments from both sides on 30 June 2016, we allowed the prosecution's appeal. We set aside the decision of the trial judge and convicted the respondent on the original charge of trafficking and sentenced him to death. Our grounds for allowing the appeal are stated below.

The Prosecution's Case

[5] On 20 March 2013 at about 4pm, a customs officer Khairul Izzuan bin Mat Nor (PW3) was on duty at the arrival hall of Lapangan Terbang Antarabangsa Senai (LTAS), Johor Bahru when PW3 spotted the respondent. The respondent was alone. He was pulling a trolley bag, exh. P8 and also carrying a sling bag. He was a passenger who had just arrived on flight MH1501 from KLIA.

[6] Upon a routine check, PW3 scanned the trolley bag, exh. P8. The scanner captured suspicious images on its screen. The trolley bag was opened by PW3 using the combination numbers given by the respondent. There were eight computer bags of "Alisan Excoon" brand were found in exh. P8. Each of the computer bag was wrapped in a translucent plastic. The computer bags appeared to be new. PW3 had put his markings on each of the computer bags with the alphabets B, C, D, E, F, G, H and I respectively. He also appended his signatures and wrote the date 20 March 2013 on each of them. The computer bag which was marked "E" was not produced at the trial.

[7] A retired senior customs officer, Larahim bin Betah (PW5), was also called and testified for the prosecution. In essence, PW5 corroborated the evidence of PW3.

[8] A senior customs officer, Khairulanuar bin Ishak (PW6) from the narcotic unit was contacted to carry out a thorough search of the trolley bag and the computer bags. In the meantime, the respondent was taken to the room at the special passenger inspection unit for purposes of the said inspection.

[9] Upon inspection of the trolley bag, PW6 noticed a brown tape was plastered around the side of the bag. He rubbed his hands against the wall of the trolley bag and he could feel lumpy substance in its wall.

[10] The respondent looked restless when the inspection on the trolley bag was being carried out.

[11] Then PW6 examined the wall of the eight computer bags. He found a black cloth pouch stitched to its inner sides. The pouch was found to contain a whitish crystalline substance suspected to be the drug ketamine.

[12] The trolley bag and eight computer bags were taken to the Narcotics Headquarters for further investigations. The pouch in the respective computer bags were marked B1, C1, D1, E1, F1, G1 and I1 respectively. A search list was prepared and together with the exhibits they were handed over to the investigating officer, Superintendent of Customs, Nur Amin bin Mohamed Rumsani (PW7). PW7 also received two hand phones belonging to the respondent whereby he checked whether the respondent had made any phone calls. The calls were made – they were international calls.

[13] Then PW6 lodged a police report *vide* Lapangan Terbang Senai Report No. 156/13, P16.

[14] On 25 March 2013, at about 10am, the suspected drugs was secured and sealed in a box marked "X1" was handed over to the Government chemist, Abdul Rahim bin Shadan (PW2) for analysis. Upon analysis, PW2 confirmed the contents and the weight of each of the black cloth pouch (totalling eight pouches) were as follows:

Exhibits	Net Weight
(1) Pouch marked B1	195.2g
(2) Pouch marked C1	229.7g
(3) Pouch marked D1	242.8g
(4) Pouch marked E1	267.0g
(5) Pouch marked F1	275.5g
(6) Pouch marked G1	272.5g
(7) Pouch marked H1	209.4g
(8) Pouch marked I1	222.3g
	1,810.0g

[15] PW2 issued a chemist report, exh. P7 in which he confirmed that the drug exhibits contained a total of 1,810g of ketamine. Ketamine is a dangerous drug listed in the First Schedule of the Act and also in the Third Schedule of the Poisons Act.

A **Findings Of The Trial Judge**

[16] The trial judge found that the respondent had actual possession or *mens rea* possession of the drug ketamine in the eight computer bags, in the trolley bag. His Lordship also accepted the testimony of PW3, PW5, PW6 and PW7 relating to the recovery of the drugs exhibits. His Lordship said, *inter alia*:

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> In so far as the element of *mens rea* knowledge of the impugned drugs was concerned, the court was satisfied that drugs which were found in the trolley bag (P8) and in the 8 computer bags were in the custody and control of the accused and in fact the learned counsel had conceded that the accused had custody of the trolley bag and the 8 computer bags inside
> C it but denied any knowledge of the presence of the drugs inside the trolley bag and the 8 computer bags. It was the accused who had given the combination numbers of the trolley bag to PW6 when it was opened. In *Gunalan a/l Ramachandran & Ors v PP* [2014] 4 MLJ 489 at p. 506, the court held that 'knowledge' is to be inferred from the facts and the surrounding circumstances of the case. It was not disputed that the drugs were found
> D in the inner lining of the wall of trolley bag and the 8 computer bags cunningly concealed from sight and had to be prised opened it order to retrieve the drugs.
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> [pp. 17 and 18 of Appeal Record, Vol. 1]
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> E Having considered the direct evidence of PW5, PW6 and PW7 respectively and the luggage tag which was in the accused's name, the Court was satisfied that the drugs were cunningly concealed in the trolley bag and in the 8 computer bags were in the custody and control of the accused at the material time. There were also corroborative evidence as to the conduct of the accused being restless upon the discovery of the
> F drugs in the trolley bag and in the 8 computer bags points to the accused having actual knowledge or *mens rea* knowledge of the drugs
>
> [p. 19 of Appeal Record, Vol. 1]
>
> In the instant case, the Court was satisfied that the accused had actual possession or *mens rea* possession of the ketamine, the subject matter of
> G the charge and the court was also equally satisfied that the prosecution had succeeded in establishing a *prima facie* case of trafficking under section 2 of the DDA, 1952. The Court has no hesitation to find the accused guilty, convict and sentence the accused if he elects to remain silent. The Court hereby called the accused to enter his defence on the original charge of trafficking. The 3 options were explained and the
> H accused elected to give sworn evidence from the witness box.
>
> [p. 20 of Appeal Record, Vol. 1]

[17] As regards the ingredient of trafficking, the prosecution relied on the acts of concealing, transporting and carrying. The trial judge made the findings as follows:

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> In the instant case the acts of trafficking which could anchor upon the accused were the acts of concealing, transporting and carrying. All these 3 acts are evident in that the accused was transporting the dangerous drug

in the trolley bag and with the 8 computer bags inside from New Delhi into Johor Bahru by plane, carrying it throughout by pushing the trolley bag and the 8 computer bags inside until to where the scanning machine was and cunningly concealing them.

[p. 16 of Appeal Record, Vol. 1]

From the facts alluded above, the court found that there was an active act of transporting, carrying and concealing of dangerous drugs, namely ketamine, in the trolley bag and in the 8 computer bags which comes within the definition of trafficking in section 2 of the Act.

[p. 17 of Appeal Record, Vol. 1]

[18] In finding that the prosecution has established a *prima facie* case of trafficking against the respondent, His Lordship said as follows:

At the close of prosecution case, it was the duty of the Court to make a ruling whether the prosecution has succeeded in proving a *prima facie* case against the accused. The Court had analysed the evidence led by the prosecution in the light of the cross-examination by the learned defence counsel. At that stage of the trial, had subjected the evidence to a maximum evaluation and the critical question of whether having evaluated the evidence at that maximum level, was the Court ready to call for the defence because if the accused elected to remain silent would the Court be prepared on the available evidence, to proceed to convict the accused. If the answer to that question was a 'YES', then a *prima facie* case would have been established.

[p. 20 of Appeal Record, Vol. 1]

[19] The respondent was called to enter his defence as charged.

The Defence

[20] The respondent gave his evidence on oath. He was the sole witness for the defence. His testimony may be summarised as follows:

(a) The respondent was from Chennai, India;

(b) The first time the respondent came to Malaysia to work. The second time he came to visit his friends. The third visit was for vacation. The fourth time, he was arrested;

(c) His occupation for the last six months was supplying of various types of bag in Chennai and Tamil Naidu;

(d) The respondent obtained the bags from the supplier introduced by a friend named Hakimbai;

(e) One day Hakimbai enquired from him whether his business in Tamil Naidu was good and he replied it was sustainable;

(f) Hakimbai suggested to him to seek the market in Malaysia by promoting and showing the bags to the shop owners in Malaysia. In that manner, the shop owners might place an order or purchase the bags from him;

A (g) However, Hakimbai reminded him to supply good quality bags to Malaysia. Hakimbai told him that he had a friend in Delhi who could supply him the bags which were of better quality than the bags available in Tamil Naidu;

B (h) Hakimbai promised to contact his friend to meet the respondent when the latter was in Delhi;

(i) The respondent went to Delhi by rail and arrived there four days before his departure to Malaysia;

C (j) In Delhi, the respondent stayed at a hotel. He informed Hakimbai who advised him that his friend would come to see the respondent;

(k) Hakimbai's friend (hereinafter called "Hindi man") did come to see him bringing along the bags of various samples and brand. Unfortunately, the Hindi man could not speak Tamil language but he spoke Hindi language;

D (l) The respondent found it difficult to communicate with the Hindi man as the respondent could only speak little Hindi language. The respondent asked the Hindi man to tell Hakimbai whatever needed to be told or explained;

E (m) On 18 March 2013, the respondent went to Delhi airport alone. The flight ticket was purchased by the Hindi man;

(n) Outside the Delhi airport, the Hindi man gave him a trolley bag (identified exh. P8) with the instruction to check in as the time was due for departure;

F (o) The trolley bag was not weighed at the airport;

(p) The Hindi man did not open the trolley bag to show the sample bags in it and their contents. Neither the respondent opened the trolley bag;

G (q) The respondent had no knowledge of the contents of the trolley bag. He reiterated that he came to Malaysia to look for the market to sell his bags;

(r) Hakimbai told the respondent that after he came out from the airport at Malaysia, someone would come to fetch him;

H (s) The respondent had two bags with him – the sling bag and the trolley bag;

(t) A customs officer directed his bags to be scanned. The respondent complied and did not run away;

I (u) The customs officer questioned him the contents of the trolley bag and he replied it contained sample bags;

(v) The customs officer opened the bag. The respondent did not open the bag, despite knowing its combination numbers;

(w) Upon the bag being opened, the customs officer informed him there were suspicious substances in the bag. The respondent replied that he did not know the contents;

(x) The customs officer pressed at the bottom of the bag and he felt loose substance like sand;

(y) The respondent was taken to a room where he was asked to wait there. Subsequently, several customs officers came. They prised open the bag where it was found to contain powderish substance;

(z) The customs officer told him that the powderish substance was drugs. The respondent claimed that he did not know about the powderish substance. He was then detained;

(aa) On knowing that the trolley bag contained the drugs, the respondent became angry and frustrated;

(bb) The respondent informed Hakimbai;

(cc) The customs officer seized his hand phone;

(dd) The respondent tendered his cautioned statement, exh. D23 which was recorded on 25 March 2013 – five days after his arrest. The essence of exh. D23 was that he had no knowledge of the drugs in the trolley bag.

Findings Of The Trial Judge At The Conclusion Of The Trial

[21] At the conclusion of the defence case, the trial judge found *inter alia*, that the defence was a total denial. This is what the trial judge said:

> In evaluating the defence case, the court found that the crux of the defence was a total denial of the drug found in the trolley bag and in the 8 computer bags which were inside the trolley bag. The accused proffered an explanation that the trolley bag and its contents was handed over to him by his friend friend's whom he did not know his name. However the accused friend's name was Hakimbai. The accused had testified that he was persuaded by Hakimbai to sell bags in Malaysia but the bag must be of good quality. The accused further explained that his friend Hakimbai has a friend who could supply the bag to be sold in Malaysia. Hakimbai's friend a Hindi who could not speak Tamil and had given the accused the trolley bag outside the airport.
>
> [p. 24 of Appeal Record, Vol. 1]

[22] The trial judge was not unmindful that the characters of Hakimbai and a Hindi man were not raised to the appropriate prosecution witnesses at the earliest reasonable opportunity during the prosecution's case. This is how the trial judge's remarked:

> In the course of the prosecution's case the accused did not put to the prosecution's witnesses in particular PW7 that the trolley bag and its contents were given to him by Hakimbai's friend whom the accused did not know the name. He did not put to PW5, PW6 and PW7 that the

A trolley bag and the contents of 8 computer bags did not belong to him neither did he put it to the investigating officer PW7 that the trolley bag and its contents belonged to Hakimbai's friend."

[pp. 24 and 25 of Appeal Record, Vol. 1]

B **[23]** The trial judge, however, recognised that the respondent did mention about Hakimbai and the Hindi man in his cautioned statement recorded in on 25 March 2013 – five days after his arrest. The trial judge observed as follows:

C The court further observed that the accused testimony mirrored essentially on what the accused had stated in D23 ... The oral evidence of the accused in Court was consistent in material parts with that of his cautioned statement.

[p. 26 of Appeal Record, Vol. 1]

[24] The trial judge also said that the respondent had canvassed the defence D that he was an innocent carrier. His Lordship wrote as follows:

The accused had also canvassed the defence of an innocent carrier in that the accused acknowledged the fact that he had brought into Malaysia the trolley bag given by Hakimbai's friend but denied that he knew the contents in the 8 computer bags contained drugs.

E [p. 27 of Appeal Record, Vol. 1]

[25] The trial judge rounded up his judgment by saying that the respondent had succeeded in establishing the defence of innocent carrier, thus rebutting the evidence of trafficking. Further, according to the trial judge the prosecution had, however, succeeded in adducing evidence to support a case F of passive possession of ketamine against the respondent under s. 12(2) and punishable under s. 12(3) of the Act. This is how the trial judge wrote in his penultimate paragraph of his judgment:

The court was of the view that accused had given a credible evidence in support of his defence of innocent carrier and on the same vein had G rebutted the evidence of trafficking of ketamine. At best, the accused was caught while carrying the trolley bag from Delhi to Johor Bahru. But the mere act of carrying was not sufficient to constitute the offence of trafficking. There was no evidence adduced to warrant an affirmative finding of trafficking. The prosecution has failed to prove a case of trafficking against the accused beyond reasonable doubt but evidence thus H far support a finding that there was a case of passive possession of ketamine against the accused pursuant to section 12(2) of DDA, 1952 and punishable under section 12(3) of the same Act. The court hereby record a finding of guilty and convict the accused pursuant to section 12(2) and punishable under section 12(3) of DDA, 1952. After hearing a plea in mitigation by learned defence counsel and rebuttal by the learned deputy, I sentenced the accused to 5 years imprisonment from the date of his arrest.

[pp. 28 and 29 of Appeal Record, Vol. 1]

The Appeal

[26] There are ten grounds listed in the ground of appeal dated 16 March 2016. Before us, however, the Public Prosecutor advanced only one ground of appeal namely, the trial judge erred in amending the charge under s. 39B(1)(a) and punishable under s. 39B(2) of the Act at the conclusion of the defence case. The charge of trafficking was reduced to a lesser offence of possession of the drug ketamine under s. 12(2) and punishable under s. 12(3) of the Act.

[27] Learned deputy argued that the prosecution had successfully proved the charge of trafficking against the respondent. The decision of the trial judge who sentenced the respondent to five years imprisonment should, therefore, be set aside. In its place, the respondent be found guilty, convicted and sentenced for an offence of trafficking under s. 39B(1)(a) and punishable under s. 39B(2) of the Act.

Our Decision

[28] The decision of the trial judge to amend and reduce the charge of trafficking in a dangerous drug to a lesser offence of possession at the conclusion of the trial is found in the concluding paragraph of His Lordship judgment (which is produced *in extenso* in para. 25 above).

[29] The amendment and reduction of the charge by the trial judge is flawed with some erroneous statements by His Lordship relating to our drugs law. Firstly, in finding that the respondent had given a credible evidence to support his defence of innocent carrier and to rebut the evidence of trafficking. The defence of innocent carrier was explained by an imminent writer Professor Glanville Williams as follows:

> In his "Textbook on Criminal Law" at p.125 Professor Glanville Williams called "wilful blindness". This is meant to deal with those whose philosophy is: "where ignorance is bliss, "tis folly to be wise". To argue away inconvenient truths is a human failing, if a person deliberately "shuts his eyes" to the obvious, because he "doesn't want to know", he is taken to know."

[30] The judgment of this court in *Hoh Bon Tong v. PP* [2010] 5 CLJ 240 is commonly referred to as an authority for an application of the defence of innocent carrier. This defence deals with an absence of knowledge. Knowledge is one of the constituent elements of possession. If a person's knowledge is deliberately and wilfully shuts to the plain truth because he blindly refuses to know it, he is imputed to have knowledge of the thing. He is liable for possession of the same. In this case, the trial judge found that the respondent has given reliable evidence to establish his defence of innocent carrier, which means to say that the respondent has given the explanation which is acceptable to the trial judge that the respondent has no knowledge of the drugs in the trolley bag and the eight computer bags. The respondent should, therefore, be acquitted and discharged of the trafficking charge.

[31] In the next moment, the trial judge had somewhat back-pedalled or resiled from his earlier finding that the respondent's defence of innocent carrier was credible. His Lordship went on to find that the prosecution had proved a case of passive possession against the respondent. The finding of the trial judge had leap-frogged from no knowledge of the drug to having knowledge, thus possession is said to be proven, though passive. The trial judge then proceeded to record a finding of guilty and convicted the respondent under a reduced charge of drug possession under s. 12(2) and punishable under s. 12(3) of the Act and sentenced him to five years from the date of arrest.

[32] Secondly, as regards the element of trafficking, the trial judge recognised that "At best the accused (respondent) was caught while carrying the trolley bag from Delhi to Johor Bahru. But the mere act of carrying was not sufficient to constitute the offence of trafficking. There was no evidence adduced to warrant the affirmative finding of trafficking." The finding of the trial judge that the evidence of trafficking was lacking to warrant such finding had flatly contradicted His Lordship earlier finding at the close of the prosecution's case. At the *prima facie* stage, the trial judge found that "there was an active act of transporting, carrying and concealing of dangerous drugs, namely ketamine in the trolley bag and in the eight computer bags which comes within the definition of trafficking in s. 2 of the Act" (p. 17 of Appeal Record, vol. 1). The direct trafficking in s. 2 of the Act involves an overt act on the part of the respondent to move the drugs either by land, sea or air for the purpose of trafficking to another person or persons and not just a mere keeping or holding. The overt act of "transporting", it was explained by Lord Diplock in *Ong Ah Chuan v. PP & Koh Chai Cheng v. PP* [1980] 1 LNS 181; [1981] 1 MLJ 64 *inter alia*, "it must mean moving the drugs from one place to another, it may mean moving them also to another person, but it need not do so." In other words, a mere possession, *albeit* passive possession of the drugs and nothing more, for example, keeping or holding the drugs *simpliciter*, is insufficient to constitute trafficking. Clearly, in the instant case the trial judge has misconstrued or mishandled the facts presented before him.

[33] On the respondent's part, he has failed to give an explanation regarding the prosecution's case of direct trafficking which has been proved against the respondent beyond reasonable doubt. The case of direct trafficking by way of transporting is exemplified by the decision of this court in *Samad Mohamed Sulthan v. PP* [2012] 1 LNS 819. The prosecution's case was simple. The appellant was found to be in possession and control of 3,998.5g of ketamine at the customs counter at the KLIA. The appellant came by flight from Mumbai to Kuala Lumpur. The court said, *inter alia,*:

> On the totality of the evidence, the court was satisfied that the prosecution had proved a case of direct trafficking beyond reasonable doubt, by the appellant transporting the said drugs from Mumbai to Kuala Lumpur under s.2 of the DDA.

[34] At the risk of repetition, the respondent was caught carrying the trolley bag from Delhi to Johor Bahru, the trial judge, at the close of the defence case, still maintained the view that the prosecution has failed to prove a case of drug trafficking against the respondent beyond reasonable doubt. This is clearly contrary to the decision of this court in *Samad Mohamed Sultan*, *supra*.

[35] Based on the legal points ventilated above, we are in agreement with learned deputy that the trial judge fell into serious error in reducing the charge against the respondent from the original charge of trafficking under s. 39B(1)(a) and punishable under s. 39B(2) of the Act to a lesser offence of possession under s. 12(2) and punishable under s. 12(3) of the Act. Such reduction of the charge is unsupported and against the weight of evidence adduced.

[36] We, accordingly, set aside the custodial sentence of five years imposed by the trial judge and in its place, we substituted with the mandatory sentence of death, an offence of drug trafficking under s. 39B(1)(a) and punishable under s. 39B(2) of the Act.